No. 11972

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CURTIS COURANT,

Appellant,

vs.

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRY LOCAL 659, ETC., *et al.,*

Appellees.

Answering Brief of Appellees International Photographers of the Motion Picture Industry Local 659, Etc., and Herbert Aller.

FILED
DEC 23 1948
PAUL P. O'BRIEN,
CLERK

BODKIN, BRESLIN & LUDDY,
HENRY G. BODKIN,
GEORGE M. BRESLIN,
MICHAEL G. LUDDY,
1225 Citizens National Bank Building, Los Angeles 13,
Attorneys for Appellees Defendant Local and Aller.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

PAGE

Index to Appendices:

TABLE OF AUTHORITIES CITED

PAGE

MISCELLANEOUS

STATUTES PAGE

PAGE

No. 11972

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CURTIS COURANT,

Appellant,

vs.

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRY LOCAL 659, ETC., *et al.*,

Appellees.

Answering Brief of Appellees International Photographers of the Motion Picture Industry Local 659, Etc., and Herbert Aller.

Additional Statement of the Case.

Appellee International Photographers of the Motion Picture Industry Local 659, etc., hereinafter referred to as Defendant Local, is a labor organization whose members, including first cameramen, are employed in the Hollywood motion picture studios; appellee Aller is its business representative; appellant, appellee Aller, and all members of Defendant Local are residents and citizens of the State of California. *Diversity of citizenship is not asserted; its absence affirmatively appears.*

Appellant seeks to recover damages for past and prospective loss of earnings, humiliation, worry, frustration, and loss of prestige, all resulting, he claims, from the refusal of Defendant Local to admit him into membership. Defendant Local, for several years last past, has had, and now has, a closed-shop contract with the Hollywood

Studios, expiring, according to the complaint, on December 31, 1948. The District Court granted motions interposed by the appellees to dismiss and entered a judgment of dismissal for lack of jurisdiction [28-29*].

In Paragraph XI of his complaint [11], appellant alleges that ever since January 1, 1942, Defendant Local has refused to admit him to membership and, with the exceptions thereafter noted, has refused to permit him to work as a first cameraman for any employer engaged in the production of motion pictures within the State of California. He alleges in Paragraph XVI of the complaint [13] that ever since January 1, 1942, the Constitution of appellee International Alliance, etc., the parent organization of Defendant Local, has provided that "no person shall be eligible to membership in said Alliance who is not a citizen of the United States or Canada, or of any other territory in which The Alliance exercises jurisdiction," and that Defendant Local and its members consider said constitutional provision to be binding upon them and have, ever since January 1, 1942, until July 11, 1947, when appellant became a citizen of the United States, treated such constitutional provision as one of the grounds for refusing to admit appellant to membership. It is further alleged in Paragraph XVII [13] that Defendant Local and its members have never advised appellant of any reason for the denial of membership, except that same was "contrary to their Constitution or that employment as first cameraman was desired for the members of" Defendant Local.

In Paragraph XIX of his complaint [14] appellant alleges that the defendant "permitted" him to be employed

---

*Figures appearing in brackets refer, unless otherwise noted, to pages of Transcript of Record.

on three productions of motion pictures, one *in 1945,* another *in* 1946, and another *in 1947,* under certain terms and conditions laid down by Defendant Local.

With respect to the closed-shop contracts existing between Defendant Local and the Hollywood Studios, appellant alleges in Paragraph VII of his complaint [7-8] as follows:

> "Local 659 is a labor organization having as one of its purposes the collective bargaining with employers upon negotiation of wages, hours and working conditions for its members; that officers and agents of Local 659 are engaged in representing and act for employee members within the above entitled district, and Local 659 maintains its principal office therein; on December 10, 1942, and all times thereafter Local 659 was a chartered local union of the IATSE; ever since December 10, 1942, Local 659 has been designated by a majority of first cameramen in said State of California as their exclusive bargaining agency on wages, hours and working conditions and, ever since the said date, Local 659 has represented first cameramen in negotiations with all employers engaged in the production of motion pictures within said State as aforesaid; *that Local 659 is not established, maintained or dominated by any employer;* ever since December 10, 1942, there has been no controversy between any employer and Local 659 as to whether or not Local 659 was the exclusive bargaining agency for first cameramen on wages, hours and working conditions of first cameramen; at all times since that date Local 659 has acted as the exclusive bargaining agency on wages, hours and working conditions of first cameramen; pursuant to, by virtue of and under the color of the authority granted to it by the National Labor Relations Act, Sections 921-923 of the

Labor Code of the State of California, and the law of the State of California, Local 659, *on or about January 1, 1943,* entered into contracts with all employers engaged in the production of motion pictures as aforesaid within the State of California, requiring as a condition of employment that all first cameramen be and remain members in good standing of Local 659, a contract with such provision being commonly known as a closed shop contract; closed shop contracts for first cameramen between Local 659 and all employers engaged in the motion picture industry within said State have remained in full force and effect from *on or about January 1, 1943,* to and including the date of the filing of this complaint; the last agreement entered into by and between IATSE, Local 659, and all employers engaged in the production of motion pictures in said State was executed in writing *as of January 1, 1946,* for a term *ending December 31, 1948,* and provides that Local 659 shall represent all first cameramen for the purpose of collective bargaining and that employers engaged in the production of motion pictures will employ only first cameramen who are members in good standing of Local 659, and that Local 659 will furnish competent men to perform the work and render the services required by the employer of first cameramen."

It will be observed from the foregoing that appellant was not employed as a first cameraman, or in any other capacity, by any of the Hollywood Studios with which Defendant Local has or has had closed-shop contracts *at the time such closed-shop contracts were executed.* So far as the particular work which appellant was "permitted" by Defendant Local to do *in* 1945, *in* 1946, and *in* 1947, it is obvious that these three assignments were executed by appellant as a permittee of Defendant Local.

I.

The Rights, Privileges, and Immunities Granted Aliens by Treaties to Which the United States Is a High Contracting Party Will Be Protected by the United States Courts Only Against Action by States or Political Divisions Thereof; in the Instant Action, Appellant Is Not Deprived of Any Right by Any Action of the State of California or Its Political Subdivisions.

For the purpose of our discussion on this point, we will assume *arguendo* that the Treaty with Poland and the Charter of the United Nations each contains a provision specifically providing that citizens of Poland residing in the United States shall have the right to work as first cameramen in motion picture studios located in the State of California. Such construction of these treaties, however, will avail appellant nothing and does not vest jurisdiction in the District Court in the instant action. Treaties to which the United States is a party, it is true, are part of the supreme law of the land, but only when official action by a state or a political subdivision thereof, by enactment of state legislation or city ordinance, deprives an alien of a right, privilege, or immunity protected and guaranteed by such treaty, do the federal courts acquire jurisdiction. As said by the Supreme Court of the United States in *Asakura v. Seattle,* 265 U. S. 332-341, 68 L. Ed. 1041-1044:

> "Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. * * * The rule of equality established by it cannot be rendered nugatory in any part of the United States *by municipal ordinances or state laws.*"*

*Italics appearing in this brief are ours unless otherwise indicated.

The rights given by treaties are not protected against individual action any more than the rights guaranteed by the Fifth and the Fourteenth Amendments to the Constitution are protected against individual action. (Point VI, *infra.*)

The quotations from the opinions of Mr. Justice Black and Mr. Justice Murphy in *Oyama v. State of California,* 332 U. S. 633, 68 S. Ct. 269 at 277 and 278, appearing on page 33 of appellant's opening brief, in no manner sustain appellant's contention that the District Court has jurisdiction of the instant action under the United Nations Charter. The question before the Supreme Court in the *Oyama* case, *supra,* was whether a statute of the State of California unconstitutionally abridged the rights of a Japanese alien. That Mr. Justice Black in referring, as he did, to the Charter of the United Nations had in mind State action, as distinguished from action of private individuals, is clearly evidenced by his use of the words "if state laws," appearing in the last sentence of the quotation from his opinion set forth in appellant's brief and reading as follows:

> "How can this nation be faithful to this international pledge if *state laws* which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

The use of the word "statute" in the concluding sentence of the quotation from Mr. Justice Murphy's opinion is likewise significant, such sentence reading as follows:

> "Its" (referring to the Alien Land Law) "inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the *statute* must be condemned."

II.

A Case Does Not Arise "Under the Constitution or Laws of the United States" Unless It Involves a Real and Substantial Dispute Respecting the Validity, Construction, or Effect of the Constitution or Such Laws, Upon the Determination of Which the Result Depends.

AUTHORITIES:

Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. Ed. 1205, 1211;

Gully v. First National Bank, 299 U. S. 109, 112, 81 L. Ed. 70, 72;

Schatte, et al. v. International Alliance, etc., et al., 70 Fed. Supp. 1008; affirmed 165 F. 2d 216 (9th C. C. A.), cert. denied May 3, 1947, 68 S. Ct. 1018, 92 L. Ed. 985.

In *Shulthis v. McDougal,* 225 U. S. 561, 569, 56 L. Ed. 1205, 1211, the Supreme Court said:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

And in *Gully v. First National Bank,* 299 U. S. 109, 112, 81 L. Ed. 70, 72, the same court used this language:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the

United States must be an element, and an essential one, of the plaintiff's cause of action. (Citing cases.) *The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.*"

Schatte, et al. v. International Alliance, supra, which is the latest authority on the subject, states the rules as follows:

"From the mere fact that a right was established by federal law, it does not follow that all litigation growing therefrom arises under the laws of the United States. Actions growing from the issue of federal land grants do not arise 'under the laws of the United States.' *Shoshone Mining Co. v. Rutter,* 177 U. S. 505, 20 S. Ct. 726, 44 L. Ed. 864; *Shulthis v. McDougal,* 225 U. S. 561, 569, 32 S. Ct. 704, 707, 56 L. Ed. 1205; *Marshall v. Desert Properties,* 9 Cir., 103 F. 2d 551, certiorari denied 308 U. S. 563, 60 S. Ct. 74, 84 L. Ed. 473. An action brought to enforce a right under a contract which is made as the result of rights granted under the patent laws to receive royalties upon sale or license of the patented device is not an action arising under the laws of the United States. *Odell v. Farnsworth,* 250 U. S. 501, 504, 39 S. Ct. 516, 63 L. Ed. 1111. To come within the provisions of these sections, the suit must really and substantially involve a dispute respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. *Malone v. Gardner,* 4 Cir., 62 F. 2d 15; *Delaware, Lackawanna & Western R. v. Slocum,* D. C., 56 F. Supp. 634."

III.

District Court Had No Jurisdiction Herein by Virtue of Any of the Provisions of the Anti-Trust Laws.

AUTHORITIES:

U. S. C. A., Section 41(23), Title 28;

U. S. C. A., Section 15, Title 15;

U. S. C. A., Section 17, Title 15;

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, 89 L. Ed. 1939;

Hunt v. Crumboch, 325 U. S. 821, 89 L. Ed. 1954;

United States v. Hutcheson, 312 U. S. 219, 85 L. Ed. 788.

Section 41(23), Title 28, U. S. C. A., grants jurisdiction to the District Courts "of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies," and Section 15, Title 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." The foregoing are among the statutes of the United States which appellant claims vest jurisdiction in this Court over the instant action; we submit that there is nothing in the complaint which even remotely suggests that the cause of action sought to be described therein comes within the provisions of the Anti-Trust Laws. Section 17, Title 15, U. S. C. A., which is part of the federal statutes relating to monopolies and

combinations, specifically excludes labor organizations from the terms of the Anti-Trust Laws. It reads as follows:

> "The labor of a human being is not a commodity or article of commerce. *Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor,* agricultural, or horticultural *organizations,* instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid *or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.*"

The Supreme Court of the United States has on numerous occasions held that, irrespective of the effect of its action upon interstate commerce, a labor union acting alone, and not in combination with business men, does not violate the Sherman Anti-Trust Act; there are no allegations in the complaint herein which even hint at any combination between Defendant Local and employers to restrain competition in, or to monopolize the marketing of, or fix prices of, any product of such employers moving in interstate commerce. The facts set forth in the complaint in the instant case bear no resemblance to the situation which was before the Supreme Court of the United States in *Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, 89 L. Ed. 1939. That the closed-shop contract possessed by Defendant Local, the operation of which precludes plaintiff from obtaining employment as a first cameraman with the employers with whom Defendant Local has such closed-shop contract, is a legitimate objec-

tive of organized labor, that is to say, that closed-shop contracts are valid and enforceable, is such an elementary proposition that no citation of authority in support thereof is necessary. Not only is Defendant Local specifically excluded from the provisions of the Sherman Anti-Trust Laws by reason of the express terms of Section 17, Title 15, U. S. C. A., above quoted, but the rule of law enunciated by the Supreme Court of the United States in *Hunt v. Crumboch,* 325 U. S. 821, 89 L. Ed. 1954; *United State v. Hutcheson,* 312 U. S. 219, 85 L. Ed. 788, and other cases, is controlling. It is only when labor organizations aid and combine with non-labor groups to create business monopolies and to control the marketing of goods that the provisions of the Sherman Anti-Trust Law become applicable. As said by our Supreme Court in the *Hutcheson* case, 312 U. S. at 232, 85 L. Ed. at 793:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

And as said by the Supreme Court of the United States in *Hunt v. Crumboch,* 89 L. Ed. 1956, 325 U. S. at 825:

> "A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as 'a commodity or article of commerce.' Clayton Act, 38 Stat. 730, 731, c. 323; Norris-Laguardia Act (March 23, 1932), 47 Stat.

70, 90, 29 USCA, Section 101, 9 FCA title 29, Section 101. See also American Foundries v. Tri-City Central Trades Council, 257 US 184, 209, 66 L. Ed. 189, 199, 42 S. Ct. 72, 27 ALR 360."

Concedely it is the law in California and in some other jurisdictions that, while a closed shop of itself is lawful and an *arbitrarily* closed union of itself is lawful, the synchronization of both is condemned as a "monopoly." This doctrine was first enunciated in the *James* case (25 Cal. 2d 721), and has been followed in companion cases thereto. The relief which has been granted in the California Courts to a person unable to obtain employment at a particular job, by reason of the existence of a close-shop contract and the *arbitrary* refusal of the labor organization possessing such closed-shop contract to admit such person into membership, consists in directing such labor organization to admit such person into membership *or* be restrained from enforcing the closed shop against him. The relief has always been granted in the alternative; the labor organization has its choice between admission of the applicant to membership or permitting him to work without *indicia* of membership. It must be emphasized, however, that even under the *James* case doctrine rejection of membership must be *arbitrary,* and if an applicant cannot meet reasonable requirements, terms, and conditions applicable to all, his rejection for that reason is not considered *arbitrary.* As was said in the *Williams* case (27 Cal. 2d 586 at 591), companion case to the *James* case:

"The individual worker denied the right to *keep his job* suffers a loss, and his right to protection

> *against such arbitrary and discriminatory exclusion* from union membership should be recognized wherever membership is a necessary prerequisite to work."

and the Court protected such "right" by restraining the labor organization from enforcing its closed-shop contract against the plaintiff in the particular case. Furthermore, the Supreme Court of California in the *James* case recognized "the right of the union to *reject* or expel persons who refuse to abide by any reasonable regulation of lawful policy adopted by the union." (25 Cal. 2d at 736.)

In the *James* and companion cases, the plaintiffs therein were Negroes; the defendant labor organization holding the closed-shop contract, by its constitution, specifically excluded Negroes from membership. The discrimination, therefore, was one based solely upon skin pigmentation. The same situation existed in the *Corsi* case (326 U. S. 88, 89 L. Ed. 2072), cited by appellant in his brief herein. That situation does not exist in the instant case. We deny, but will assume *arguendo,* that under the doctrine of the *James* case Defendant Local has a "monopoly," as that word is used in the State Court decision, in view of the synchronization of its closed shop and alleged closed union. *Nevertheless, such fact in no manner gives this Court jurisdiction of the instant controversy.* The monopoly contemplated by the federal anti-trust laws is not such a "monopoly" as that described in the *James* and companion cases, *i. e.,* "of the supply of labor." Furthermore by the express terms of the federal anti-trust laws labor organizations are excluded from their operation.

IV.

Statutes of the United States "Regulating Commerce" Do Not Vest Jurisdiction in the District Court Over the Instant Action.

AUTHORITIES:

U. S. C. A., Section 41(8), Title 28;

Delaware L. & W. R. Co. v. Slocum, 56 Fed. Supp. 634;

Schatte, et al. v. International Alliance, etc., et al., 70 Fed. Supp. 1008, Affirmed 165 F. 2d 216 (C. C. A. 9th), cert. denied May 3, 1947, 68 S. Ct., 1018, 92 L. Ed. 985.

Appellant asserts that the District Court has jurisdiction by reason of Section 41(8), Title 28, U. S. C. A., which grants jurisdiction to the United States District Courts "of all suits and proceedings arising under any law regulating commerce"; we submit that this statute has no application herein. The controversy presented by appellant's complaint does not arise out of any law *regulating commerce;* the fact that a controversy may *affect* interstate commerce does not give District Courts of the United States jurisdiction of such controversies.

In *Delaware L. & W. R. Co. v. Slocum,* 56 Fep. Supp. 634, the District Court for the Western District of New York had before it an action filed by an employer against competing labor unions in which declaratory relief was sought, the employer desiring a judgment construing certain separate contracts between the employer and two

labor organizations. Each of the labor organizations claimed jurisdiction over and the right to represent "crew callers" and insisted that under their respective contracts with the employer each had jurisdiction over such classification of work. Motions to dismiss were interposed upon the ground that the Court lacked jurisdiction. We quote from the opinion as follows:

> "A suit does not arise under the laws of the United States unless it 'really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends.' (Citing cases.) It is patent from the complaint that this suit does not involve the 'validity, construction, or effect' of any federal statute, but rather seeks the determination of its rights or liabilities under certain contracts. It has been urged that this is a suit for a violation of the commerce laws, 28 U. S. C. A., Sec. 41(8), and that this court has original jurisdiction. The nature of the suit is to be determined by the complaint (citing cases) and nothing therein reveals that the acts charged have any relation to the commerce laws. It is true that the plaintiff in the operation of its railroad was engaged in interstate commerce, *but the mere fact that interstate commerce may be affected is not sufficient to give jurisdiction* in a private suit unless the suit directly concerns an Act of Congress. (Citing cases.)"

To the same effect is *Schatte, et al. v. International Alliance, supra:*

> "28 U. S. C. A., Sec. 41(8) confers jurisdiction on the District Courts of the United States in 'all suits and proceedings arising under any law regulating commerce,' without regard to the jurisdictional amount requirement of 28 U. S. C. A., Sec. 41(1). Since more than $3,000 is involved in this action, Section 41(8) will not establish jurisdiction in this court if it cannot be established under Section 41(1), which grants jurisdiction in all suits where the matter in controversy exceeds $3,000 and 'arises under the Constitution or laws of the United States.'
>
> "It is not enough that the dispute should merely *affect* commerce to bring it within the scope of Section 41(8) or Section 41(1). *Delaware, Lackawanna & Western R. v. Slocum,* D. C., 56 Fed. Supp. 634.
>
> "In *Gully v. First National Bank,* 299 U. S. 109, at page 112, 57 S. Ct. 96, at page 97, 81 L. Ed. 70, Mr. Justice Cardozo said:
>
> " 'To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. * * * The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.' "

V.

Neither National Labor Relations Act Nor Labor-Management Relations Act, 1947, Vests Jurisdiction in the District Court Over Subject Matter of Action or Parties Thereto.

AUTHORITIES:

N. L. R. A., 29 U. S. C. A,, Sections 151-166;

L. M. R. A., 1947, 29 U. S. C. A., Sections 141-197;

Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 99 F. 2d 309 at 315;

Fur Workers Union, etc. v. Fur Workers Union, 105 F. 2d 1 at 12 (affirmed in 308 U. S. 522, 84 L. Ed. 443);

N. L. R. A., Section 10(e), (1);

L. M. R. A., 1947, Section 301(a);

L. M. R. A., 1947, Section 303;

L. M. R. A., 1947, Section 102;

L. M. R. A., 1947, Section 8(3);

Amazon Mills Co. v. Textile Workers Union (C. C. A. 4, 1948), 167 F. 2d 183;

Gerry of California v. Superior Court (1948), 32 A. C. 141, 194 P. 2d 689.

Among the statutes of the United States asserted by appellant as vesting jurisdiction in the District Court are the National Labor Relations Act (N. L. R. A.) (29 U. S. C. A., Sections 151-166) enacted July 5, 1935, and its successor, the Labor-Management Relations Act, 1947, (L. M. R. A.) (29 U. S. C. A., Sections 141-197) enacted

June 23, 1947, with certain provisions respecting closed shops not operative until August 22, 1947. Under N. L. R. A. no jurisdiction of any sort was vested in the District Courts of the United States; the National Labor Relations Board was given exclusive power to enforce rights guaranteed by that Act to employees, subject only to review by the proper Circuit Courts of Appeals. Thus, Section 10(a) of the N. L. R. A. (29 U. S. C. A., 160(a)), reads as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

Judge Sanborn, speaking for the Circuit Court of Appeals, Eight Circuit, in *Donnelly Garment Co. v. International Ladies' Garment Workers' Union,* 99 F. 2d 309 at 315, said:

> "It also seems clear to us that the *only* jurisdiction conferred by the National Labor Relations Act upon federal courts is that conferred upon the Circuit Courts of Appeals with respect to enforcing, modifying and setting aside orders of the National Labor Relations Board."

The relative jurisdictions of the Federal Courts and the National Labor Relations Board under the provisions of N. L. R. A. are expressed clearly and at length by the

United States Court of Appeals for the District of Columbia in *Fur Workers Union, etc. v. Fur Workers Union,* 105 F. 2d 1 at 12 (affirmed in 308 U. S. 522, 84 L. Ed. 443).

Other decisions exist and might be cited in support of our contention that District Courts of the United States under N. L. R. A. had no jurisdiction of actions such as that set forth in the complaint herein, or, for that matter, any other action purportedly arising under N. L. R. A. However, in view of the fact that the rule above set forth is so clearly and uniformly established, without dissent or suggestion thereof, we deem it unnecessary to cite further authorities.

It is true that when Congress enacted L. M. R. A., 1947, it vested in District Courts of the United States jurisdiction over certain actions, which jurisdiction had not previously been vested in such Courts pursuant to N. L. R. A. By the terms of Section 10(e), (1), the National Labor Relations Board in its own name may institute actions in the appropriate District Courts to restrain certain specifically defined unfair labor practices. Obviously, the complaint in the instant case does not come within the purview of such Section; jurisdiction thereby is vested only in actions brought by the N. L. R. B. and for the purpose of preventing certain unfair labor practices.

Another section of L. M. R. A., 1947, vesting jurisdiction in the District Courts, where such jurisdiction did not previously exist, is Section 301(a), which reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations,

> may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The instant case does not come within the foregoing and above quoted section because (a) it is not a suit for violation of a contract between an employer and a labor organization, etc., and (b) said section does not contemplate an action brought by an individual, but was intended by Congress to grant jurisdiction to the United States District Courts in actions between employers and labor organizations based upon alleged violations of collective bargaining agreements.

Section 303, L. M. R. A., 1947, makes unlawful, for the purposes of that section only, secondary boycotts, unfair labor practices, and jurisdictional strikes, and then provides in subsection (b) thereof as follows:

> "Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Since the complaint herein does not in any manner relate to secondary boycotts, unfair labor practices, or jurisdictional strikes, the subject matter thereof does not come within the provisions of Section 303 above quoted. Fur-

thermore, while Section 301 specifically waives amount in controversy and diversity of citizenship, Section 303 waives only amount in controversy; thus, in any event, in an action brought under Section 303 diversity of citizenship is a requisite.

District Courts of the United States are likewise given jurisdiction with respect to the criminal provision defined in Section 302, L. M. R. A., 1947, relating to restrictions on payments to employee representatives, but, of course appellant makes no claim that pursuant to that section the District Court has jurisdiction over the instant action. So far as we are advised, the foregoing constitute the only provisions of L. M. R. A., 1947, vesting jurisdiction in District Courts of the United States, and such jurisdiction in those instances is expressly limited as to parties and subject matter; neither appellant nor the subject matter of his action comes within the purview of such permitted actions or vested jurisdiction. Furthermore, under Section 102, L. M. R. A., 1947, any closed-shop contract existing on June 23, 1947, when that Act was enacted, is recognized as being valid and enforceable to the date of its expiration, and any closed-shop contract executed prior to August 22, 1947, and after June 22nd, 1947, is likewise so recognized, provided it is not for a period of more than one year. The complaint in the instant case (Paragraph VII (8)) sets forth the fact that Defendant Local has a closed-shop contract ending December 31, 1948, which was executed on January 1, 1946. Hence, under the terms of said Section 102, L. M. R. A., 1947, the closed-shop

contract of Defendant Local is valid, enforceable, and not against public policy. Upon the expiration of the closed-shop contract held by Defendant Local appellant has the right, pursuant to Section 8(3) of L. M. R. A., 1947, to obtain employment as a first cameraman, if such he can obtain, without being a member of Defendant Local, and within thirty days after obtaining such employment must apply for membership in Defendant Local provided, in accordance with said section of that Act, Defendant Local then has a Union Shop, and if Defendant Local does not accept him into membership in accordance with said section it cannot exercise its economic strength or in any manner bring about appellant's discharge by his employer.

If the acts of the appellees of which appellant complains constitute violations of the Labor-Management Relations Act, 1947, no District Court has jurisdiction over same as such jurisdiction is by said Act vested exclusively in the National Labor Relations Board. (*Amazon Mills Co. v. Textile Workers Union, supra; Gerry of California v. Superior Court, supra.*)

VI.

Jurisdiction Is Not Vested in the District Court Over the Instant Action Under the Fifth or the Fourteenth Amendments to the Constitution of the United States, Nor by Secion 41, Title 28, USCA, or Any Subsection Thereof, Section 43, Title 8, USCA, Section 47(3), Title 8, USCA, Section 48, Title 8, USCA, Nor by Civil Rights Statutes.

AUTHORITIES:

Corrigan v. Buckley, 271 U. S. 323, 330, 70 L. Ed. 969, 972;

Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 836;

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667;

United States v. Harris, 106 U. S. 629, 639, 27 L. Ed. 290, 294;

California Oil and Gas Co. v. Miller, 96 Fed. 12, 22;

Love v. Chandler, 124 F. 2d 785 (C. C. A. 8);

Simpson v. Geary, 204 Fed. 507;

Mitchell v. Greenough (C. C. A. 9), 100 F. 2d 184, 187; cert. denied 306 U. S. 659, 83 L. Ed. 1056;

Love v. United States, 108 F. 2d 43, 45-46 (cert. denied 309 U. S. 673, 84 L. Ed. 1018);

Brents v. Stone, et al., 60 Fed. Supp. 82;

Emmons v. Smitt, et al., 58 Fed. Supp. 869;

Haywood v. United States, 268 Fed. 795;

United States v. Moore, 129 Fed. 630;

Schatte, et al. v. International Alliance, etc., et al., 70 Fed. Supp. 1008; affirmed 165 F. 2d 216 (9th C. C. A.); cert. denied 92 L. Ed. 985.

The Constitutional Amendments and Statutes of the United States referred in the above point are relied upon by appellant in support of his contention that the District Court has jurisdiction of the subject matter of and parties to this action. They all relate to the powers, privileges, and immunities granted citizens of and persons residing in the United States. In our opinion, the cause of action which appellant seeks to allege in his complaint is not one arising out of, secured by, nor dependent upon any of the Constitutional Amendments or Statutes which we have grouped for discussion under this point.

It has long been settled that the Fifth Amendment to the Constitution of the United States is a limitation only upon the federal government and does not limit individual action. In the language of *Corrigan v. Buckley,* 271 U. S. 323, 330, 70 L. Ed. 969, 972:

> "The 5th Amendment 'is a limitation only upon the powers of the general government,' *Talton v. Mayes,* 163 U. S. 376, 382, 41 L. Ed. 196, 198, 16 Sup. Ct. Rep. 986, and is not directed against the action of individuals."

In the *Civil Rights Cases,* 109 U. S. 3, 27 L. Ed. 836, the Supreme Court of the United States, years ago, interpreted the Fourteenth Amendment to the Constitution of the United States as applying solely to state action and not to individual action. In the language of that Court in that decision:

> "It is state action of a particular character that is prohibited. Therefore, invasion of individual rights is not the subject matter of the Amendment. . . ."

Similarly, in *Virginia v. Rives,* 100 U. S. 313, 25 L. Ed. 667, in referring to Section 1 of the Fourteenth Amendment, the Court stated at page 318 of 100 U. S. and at page 669 of 25 L. Ed. that:

> "The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals."

See also,

United States v. Harris, 106 U. S. 629, 639, 27 L. Ed. 290, 294 and

California Oil and Gas Co. v. Miller, 96 Fed. 12, 22.

All of the Civil Rights Statutes have been construed, as was the Fourteenth Amendment, to provide redress against state action, and not against the invasion of private rights by individuals. These principles, and the authorities establishing them, are summarized in *Love v. Chandler,* 124 F. 2d 785 at 786-787, quotation from which appears as appendix A hereof.

In *Simpson v. Geary,* 204 Fed. 507, the plaintiffs contended that they were deprived of their right to work as brakemen and flagmen by reason of an Arizona law. In holding that no Federal jurisdiction could be invoked on the facts alleged in the complaint, the Court stated as follows:

> *"The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regulating such employment*

discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil rights of such persons are invaded, and the protection of the federal Constitution can be invoked to protect the individual in his employment or calling."

In *Mitchell v. Greenough* (C. C. A. 9), 100 F. 2d 184, 187, that Court, in construing 8 U. S. C. A. 47, stated as follows:

> "The prohiibtion against 'denial of the equal protection of the law' was to prevent class legislation or action."

A lengthy dissertation in accord with the *Chandler* decision will be found in *Love v. United States,* 108 F. 2d 43, 45-46 (cert. denied 309 U. S. 673, 84 L. Ed. 1018), in which the Circuit Court of Appeals for the 8th Circuit said:

> "Certain disputes which have arisen on various occasions in the course of our history in respect to the tenure of 'offices' and the power to make removals of incumbents or to replace them with other appointees, have called forth the utmost effort of the courts to find peaceful solution in law and reason. Several such controversies were recognized to be of far-reaching importance. They were justiciable and were settled upon profound consideration by judicial determination.
>
> *"But such determination has always been rested upon the interpretation and application of the provisions of the constitution and federal enactments. It cannot be predicated upon any judicial concept concerning an able-bodied, competent and willing man's*

> *natural or inherent right to work. Unless a legal right has been defined and conferred by legislative authority, no justiciable controversy is present. The principles applicable are the same in the field of government work as in the broader field of private enterprise. The right to work at a particular employment must be shown to have become vested by law in the person asserting it.* (Citing cases.)"

A case involving the question of the right to practice law and whether it is protected by the Constitution or Statutes of the United States is *Brents v. Stone, et al.,* 60 Fed. Supp. 82, from which we quote as follows on page 84:

> "Nor can the action be sustained as one to secure protection of civil rights under the Federal Constitution, for a license to practice law is not a privilege within the purview of any constitutional provision. (Citing cases.)"

To the same effect is:

Emmons v. Smitt, et al., 58 Fed. Supp. 869.

Other decisions which hold adversely to the contention of appellant that the District Court has jurisdiction either under the Fifth or the Fourteenth Amendments to the Federal Constitution or under the Civil Rights Statutes are *Haywood v. United States,* 268 Fed. 795, in which the Circuit Court of Appeals for the Seventh Circuit said at pages 800-801, "to produce, to sell, to contract to sell to any buyer, are not rights or privileges conferred by the Constitution and laws of the United States," and *United States v. Moore,* 129 Fed. 630, in which it was held that the right of a citizen to organize persons in any pursuit

was a fundamental right in all free governments, but was not a right, privilege, or immunity granted or secured to citizens of the United States by its Constitution or laws, and is left solely to the protection of the states.

Schatte, et al. v. International Alilance, etc., et al., 70 Fed. Supp. 1008 at 1010-1011, 165 F. 2d 216, cert. denied 92 L. Ed. 985, the latest decision on the subject, summarizes the applicable law as follows:

> ". . . this court would still be without jurisdiction, since these statutes" (Sec. 41(12), Title 28, Sec. 47(3), Title 8) "were passed to protect individuals from violations of their rights by State action, and none is here alleged. *Love v. Chandler,* 8 Cir., 124 F. 2d 785, 786, 787. Only rights of citizens under the laws of the United States are protected. *Mitchell v. Greenough,* 9 Cir., 100 F. 2d 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056. That being true, since more than $3,000 is admittedly involved, this section can in no event confer any jurisdiction not already given by 28 U. S. C. A., Sec. 41(1), which is hereinafter discussed.
>
> "28 U. S. C. A., Sec. 41(1) and 8 U. S. C. A., Sec. 43 provide for redress for deprivations of rights under color of any law, statute, ordinance, regulation, custom, or usage of any State or Territory, in express terms. It is not alleged that the defendants are acting under color of any State law, etc., so these sections cannot act to establish jurisdiction in this court. *Allen v. Corsano,* D. C., 56 F. Supp. 169; *California Oil & Gas Co. v. Miller, C. C. Cal.,* 96 F. 12, 22. *Picking v. Pennsylvania R.,* 3 Cir., 151 F. 2d 240, is not applicable here, because the wrongs alleged in that case were all under color of State law.
>
> * * * * * * * *

"The Fifth and Fourteenth Amendments of the Constitution are designed to protect the individual from invasion of his rights, privileges and immunities by the federal and the State governments respectively. *Corrigan v. Buckley,* 271 U. S. 323, 330, 46 S. Ct. 521, 70 L. Ed. 969; *Civil Rights Cases,* 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Neither *Hague v. C. I. O.,* 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, nor *Screws v. United States,* 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330, has overruled these cases, even by implication, for the wrongs complained of in both the *Hague* and the *Screws* case were committed by the government or under color of law.

* * * * * * * *

"The bare right to work is not a right protected by federal law. *Love v. United States,* 8 Cir. 108 F. 2d 43, certiorari denied 309 U. S. 673, 60 S. Ct. 716, 84 L. Ed. 1018, and cases therein cited; *Brents v. Stone,* D. C., 60 F. Supp. 82, 84; *Emmons v. Smitt,* D. C., 58 F. Supp. 869, affirmed 6 Cir., 149 F. 2d 869, 872."

From the foregoing, it appears clear that the right to contract for and retain employment in a given occupation or calling (*Simpson v. Geary, supra; Love v. Chandler, supra*), the right to be admitted to the practice of law (*Mitchell v. Greenough, supra; Brents v. Stone, et al., supra; Emmons v. Smitt, et al., supra*), the right to work at a particular employment (*Love v. United States, supra*), the right to produce, to sell, to contract to sell to any buyer (*Haywood v. United States, supra*), the right to organize persons in any pursuit (*United States v. Moore, supra*), or the right to work as a set erector in the Hollywood

Studios under a contract negotiated pursuant to the terms of the National Labor Relations Act (*Schatte, et al. v. International Alliance, etc., et al., supra*), are not rights, privileges, or immunities granted or secured to citizens or residents of the United States by its Constitution or laws; certainly, therefore the "right" to work as a first cameraman in the Hollywood Studios is not such a right.

VII.

No Provision of the California Labor Code Can Vest Jurisdiction in the District Court.

AUTHORITIES:

Labor Code, State of California, Sections 921 to 925;

Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379;

Smith Metropolitan Market Co. v. Lyons, 16 Cal. 2d 389.

Among the statutes and laws relied upon by appellant as vesting jurisdiction in the District Court, are Sections 921 to 925, inclusive, Labor Code, State of California. That the close-shop contract existing between Defendant Local and the Studio employers of first cameramen is valid despite any provision of the California Labor Code is clearly established by numerous decisions of the California Supreme Court, including *Shafer v. Registered Pharmacists Union,* 16 Cal. 2d 379, and *Smith Metropolitan Market Co. v. Lyons,* 16 Cal. 2d 389.

It is elementary that the jurisdiction of District Courts of the United States stems from and is to be found only in the Constitution and statutes of the United States; no state law can enlarge or diminish the scope of such jurisdiction.

VIII.

Requirement in Constitution of the Alliance That Members Be Citizens of the United States or of Canada, or of Any Other Territory in Which the Alliance Exercises Jurisdiction, Is Reasonable and Valid and Violates No Right of Appellant Protected by Any Provision of the Constitution or Laws of the United States; Aliens May Lawfully Be Excluded From Privileges Extended by Law to Citizens.

The foregoing proposition is illustrated by the following examples:

Aliens may be excluded from owning a pool hall business (*Clarke v. Deckebach,* 274 U. S. 392, 71 L. Ed. 1115), from public employment (*Heim v. McCall,* 239 U. S. 173, 60 L. Ed. 206), from taking game as a sportsman (*Patsone v. Pennsylvania,* 32 U. S. 183, 58 L. Ed. 539); and they may be denied the right to ownership or interest in the real property of a state (*Terrace v. Thompson,* 263 U. S. 197, 68 L. Ed. 255).

A number of federal statutes preclude aliens from entering into certain activities. Examples of such statutes are as follows:

(1) No radio station license can be granted or held by any alien or the representative of any alien or by any corporation in which more than one-fourth of the directors are aliens or more than one-fourth of the capital stock is owned or voted by aliens, 47 U. S. C. A., Telegraphs, Telephones and Radio Telegraphs, Section 310.

(2) Aliens are precluded from taking animals or birds by use of firearms in the territories and insular possessions of the United States except under a special alien license. In the obtaining of a license to sell or engage in the trade or selling of the skins of fur-bearing animals, an alien is charged a considerably greater license fee than is a resident of the territory involved or a non-resident of the territory who is a citizen of the United States, 48 U. S. C. A., Territories and Insular Possessions, Section 189, Subdivisions (e) and (h).

(3) No alien can homestead federal lands unless he has filed his declaration of intention to become a citizen, 43 U. S. C. A., Public Lands, Section 16.

(4) Aliens may obtain leases and prospecting permits as to federal lands only on a limited basis, 30 U. S. C. A., Mineral Lands and Mining, Section 181.

(5) An alien who has not declared his intention to become a citizen of the United States may not acquire title to any land in the territories of the United States with limited exceptions, 8 U. S. C. A., Aliens and Nationality, Section 71.

The same rule applies to the "acquisition, holding, owning, and disposition of real estate in the District of Columbia," 8 U. S. C. A., Aliens and Nationality, Section 78, and applies, on even a broader basis, in Hawaii, 8 U. S. C. A., Aliens and Nationality, Section 83. No telegraph or cable lines owned or operated or controlled by aliens may

be established in or permitted to enter Alaska, 48 U. S. C. A., Territories and Insular Possessions, Section 302(a).

Moreover, in the interest of the protection of their citizens, the various states have enacted a number of statutory provisions precluding aliens from engaging in activities or occupations that may be entered into by citizens. Examples of such statutory enactments culled from the statutes of the State of California are:

(1) It is provided in Section 118 of the Business and Professions Code that if an alien admitted to practice law fails to become naturalized within a reasonable time after he is eligible, his license shall be revoked on a motion of the attorney general by the district court of appeal which admitted him to practice.

(2) Fishing and hunting license for sporting may be obtained by aliens only upon the payment of license fees greatly in excess of sums required of citizens, Fish and Game Code, Sections 427 and 428.

(3) No alien or person who is not a citizen of the United States may obtain a nursing license unless he has declared his intention to become a citizen of the United States, and if he fails to become a citizen, after having made such declaration, his license shall become void at the end of seven years from the date of filing such declaration of intention, Business and Professions Code, Sections 2736(b), 2743, and 2744.

(4) Aliens are not entitled to old age pensions, Welfare and Institutions Code, Section 2160(b).

(5) No person not a citizen of the United States is eligible for a pharmaceutical license unless he shall have filed and proven his intention to become a citizen. If citizenship is later denied, then his license and privileges are automatically cancelled, Business and Professions Code, Section 4096.

(6) Section 1941 of the Labor Code provides that no person except a citizen shall be employed in any department of the state or any county or city. Section 1943 of the Labor Code provides that no money shall be paid out of the state treasury nor out of the treasury of any county or city to any officer or employee unless such person is a citizen.

(7) Section 1850 of the Labor Code precludes contractors or sub-contractors to employ on any public work any alien except in cases of extraordinary emergency.

In view of the foregoing, it does not seem to us to be open to question that the provisions of the Constitution of The Alliance, a private voluntary association, requiring members to be citizens of the United States, Canada, or territory in which The Alliance exercises jurisdiction, is a reasonable and valid regulation. *However, even if such regulation were deemed arbitrary and discriminatory, such construction thereof would in no manner vest jurisdiction over this action and the parties in the District Court in the absence of diversity of citizenship.*

IX.

Since Defendant Local Has Never Been Nor Professed to Be Bargaining Representative of Appellant and Has Never Undertaken to Bargain for Him, Tunstall Case Doctrine Has No Application.

AUTHORITIES:

Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187;

Steele v. Louisville and N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173;

Brotherhood of Locomotive Firemen, etc. v. Tunstall (C. C. A. 4th), 163 F. 2d 289.

The Supreme Court of the United States, on the same day in 1944, handed down two decisions (*Tunstall v. Brotherhood of Locomotive Firemen, etc., supra,* and *Steele v. Louisville and N. R. Co., supra*). For convenience, we shall refer to the rule of law enunciated by these decisions as The Tunstall Case Doctrine, which has subsequently been applied in several cases in both the State and Federal courts (*Graham v. Southern Ry. Co.,* 74 Fed. Supp. 663; *Betts v. Easley,* 161 Kan. 459, 169 P. 2d 831, 166 A. L. R. 342), which cases, including the two decisions of the Supreme Court of the United States promulgating The Tunstall Case Doctrine, are, in his opening brief, cited and quoted from by appellant in support of his contention that The Tunstall Case Doctrine is applicable, and that by reason thereof the District Court has jurisdiction of the instant action.

After the Supreme Court had settled the applicable law, the *Tunstall* case, *supra,* went back to the District Court for trial, and subsequently reached the United States Cir-

cuit Court of Appeals for the Fourth Circuit, and is reported as *Brotherhood of Locomotive Firemen, etc. v. Tunstall,* 163 F. 2d 289.

The factual situation forming the basis of The Tunstall Case Doctrine is best expressed in the following language of the Chief Justice, taken from 89 L. Ed. at page 192 (323 U. S. at 211):

> "This is a companion case to No. 45, *Steele v. Louisville & N. R. Co.,* decided this day (323 U. S. 192, *ante,* 173, 65 S. Ct. 226) in which we answered in the affirmative a question also presented in this case. The question is whether the Railway Labor Act, 48 Stat. 1185, c. 691, 45 USCA, Secs. 151 *et seq.,* imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway *employees,* the duty to represent all the *employees without discrimination because of their race.* The further question in this case is whether the federal courts have jurisdiction to entertain a non-diversity suit in which petitioner, a railway *employee* subject to the Act, seeks remedies by injunction and award of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft *without discrimination because of race.*"

It appears further from the decision in the *Tunstall* case that the Brotherhood of locomotive F. & E. was, pursuant to the Railway Labor Act, *the bargaining agent of the plaintiff therein* and a large number of other Negro *employees* similarly situated. The constitution of the Brotherhood specifically excluded Negroes from membership. *No closed-shop contract existed.* Despite its legal obligation to fairly and without discrimination represent all *em-*

ployees for which it was the bargaining agent, pursuant to the Railway Labor Act, the Brotherhood entered into a contract with the railroad employers which froze Negroes on their present jobs, provided that promotions must be made from a "promotable pool," and that only white persons could thereafter be placed in such "promotable pools." As the Court said in its opinion (89 L. Ed. at 192, 323 U. S. 211-212):

> "Petitioner complains of the discriminatory application of the contract provisions to him and other Negro members of his craft in favor of 'promotable,' *i. e.* white, firemen, by which he has been deprived of his pre-existing seniority rights, removed from the interstate passenger run to which he was assigned and then assigned to more arduous and difficult work with longer hours in yard service, his place in the passenger service being filled by a white fireman."

The opinion in the *Tunstall* case adopts the decision rendered the same day in its companion case of *Steele v. Louisville, etc.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, in which action the plaintiff therein was likewise a Negro and voiced the same complaint as that asserted by Tunstall. From that opinion, we learn more of the facts involved in each case, and we quote therefrom in Appendix B hereof.

The foregoing quotations taken from the *Tunstall* and *Steele* cases are sufficient, it seems to us, to clearly establish that the question presented to the Supreme Court of the United States therein bears no resemblance to that

which the instant controversy presents. The distinction between the *Tunstall-Steele* cases and this action may be summarized as follows: (1) In the *Tunstall* case, the Railway Labor Act was involved and no closed-shop contract existed (such a contract being invalid under that Act), whereas in the instant case the National Labor Relations Act is involved and a valid closed-shop contract does exist; (2) in the *Tunstall* case, plaintiff therein was and for a long period of time had been *employed* by the railroad, and *his duly elected bargaining agent* made a contract deliberately discriminating against him solely because of his color, whereas in the instant action appellant is not *employed* in any work classification over which Defendant Local has or asserts jurisdiction, and *Defendant Local is not his bargaining agent;* (3) in the *Tunstall* case, the Brotherhood specifically excluded plaintiff because of color, whereas in the instant case no such arbitrary exclusion is asserted, and exclusion because of lack of citizenship is reasonable and not arbitrary; (4) in the *Tunstall* case (as set forth in 163 F. 2d at 293) when the action was tried on its merits after the Supreme Court had settled the law applicable, the Brotherhood "used its power *as bargaining agent* in violation of the rights of those *for whom it undertakes to bargain* and has thereby inflicted injury upon one of those *whom it professes to represent,*" whereas in the instant case the Defendant Local is not the bargaining agent of appellant and never has and does not now profess to represent him; (5) the Railway Labor Act does not recognize closed-shop con-

tracts (to the contrary, closed-shop contracts are unlawful under the Railway Labor Act (40 Opinion Atty. Gen.—No. 39, Dec. 29, 1942)), whereas same are recognized as valid by the National Labor Relations Act and the Taft-Hartley Act; and (6) by the terms of the National Labor Relations Act (Sec. 2) and Labor-Management Relations Act, 1947 (Sec. 2), employees subject to the Railway Labor Act are specifically excluded.

Since appellant is not, and was not when the closed-shop contracts were executed, employed by any employer with which Defendant Local has or had a closed-shop contract, and since, even as a permittee of Defendant Local, his three assignments, *in* 1945, *in* 1946, and *in* 1947, were not performed at any time when the closed-shop contracts herein were actually executed, he is a stranger to those contracts, a stranger to the Defendant Local, and a stranger to the employers with whom the closed-shop contracts existed and exist. Defendant Local has never represented appellant as bargaining agent and has never professed to so represent him.

As unequivocally appears from the quotations, which we have above or in the Appendix hereto set forth, taken from the *Tunstall-Steele* decisions, jurisdiction is vested in District Courts in actions under the Railway Labor Act against the bargaining agent, designated pursuant to such Act, by *employees,* only when such actions are brought by *employees* discriminated against in a contract negotiated by the bargaining agent professing to represent such *employees* and on whose behalf the bargaining agent

undertook to bargain. Under the National Labor Relations Act (Section 9(a)) and the Labor-Management Relations Act, 1947 (Section 9(a)), it is provided that:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the *employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all of the *employees* in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Provided, that any individual *employee* or a group of *employees* shall have the right at any time to present grievances to their employer, etc."

It is not open to question, not only from the decisions, but from the language immediately above quoted, which contains no uncertainty or ambiguity and calls for no interpretation or judicial conjecture, that under the National Labor Relations Act and the Labor-Management Relations Act, 1947, a designated or selected bargaining agent represents, undertakes to represent, and professes to represent only employees in the particular unit for which it is such bargaining agent. In the instant case, as appears on the face of the complaint, Defendant Local is the designated bargaining agent of the unit consisting of first cameramen *employed* in the Studios; appellant, not being so employed, is not within that unit; Defendant Local does not represent him and has never undertaken or professed to do so; it is not appellant's bargaining representative and has never represented him in negotiations or made any contract on his behalf.

Furthermore, we submit that even if it be assumed, *arguendo,* first, that the citizenship requirement for applicants for membership in the Defendant Local is, as appellant in his complaint alleges, "unreasonable, arbitrary, capricious and without justification," and, secondly, that appellant was an employee in the unit of first cameramen within the meaning of the word "employee" as used in the *Tunstall* case; nevertheless, Defendant Local, not being a "company-dominated" labor organization, in negotiating and executing a closed-shop contract, and, subsequently, in refusing appellant membership, *violated no provision of the National Labor Relations Act either as it existed prior to amendment by the Taft-Hartley Act, or thereafter.*

Membership in a *labor organization* by an employee, even though the labor organization has a closed-shop contract covering the work classification in which such employee is engaged, *is not a right granted by the National Labor Relations Act.* Defendant Local, as bargaining representative, had a legal right under the National Labor Relations Act to enter into the closed-shop contracts; Defendant Local, we repeat, as a *labor organization,* is not, and never has been, required under the National Labor Relations Act to admit any person, even though he be an employee, to membership.

The refusal of Defendant Local, as a *labor organization,* to admit appellant to membership cannot be made the basis of litigation, diversity of citizenship being absent, in the District Court below. Whether appellant has ever had, or now has, a cause of action in the California

State Courts under the *James* case rule or before the National Labor Relations Board against Defendant Local in its capacity as a *labor organization,* as distinguished from its capacity as a *bargaining representative,* would be of academic interest only, and for that reason our views thereon are not now expressed.

On page 9 of his opening brief, appellant states that Defendant Local was his "exclusive bargaining agent," that it violated his rights under the National Labor Relations Act "by refusing to represent him," "by refusing to treat him on an equal basis with all other first cameramen in the bargaining unit, etc.," and discriminated against him "as his unwilling representative" on wages, hours, and conditions of employment. Again on page 25 of said brief, appellant states that Defendant Local, "by virtue of statute," is his "exclusive bargaining agent on wages, hours and working conditions."

There is no semblance of support in the record for these statements. There is no allegation in the complaint to the effect that Defendant Local ever represented, undertook or professed to represent appellant as his bargaining agent or otherwise; the affirmative facts alleged in the complaint conclusively negate any suggestion that an actual, implied, or professed representation of appellant by Defendant Local ever existed. The erroneous premise contained in the above quoted statements necessarily leads appellant to the equally erroneous conclusion that The Tunstall Case Doctrine is applicable.

X.

Wallace Case Has No Application Because Defendant Local Is Not a Company-Dominated Labor Organization and Appellant Was Not Employed as a First Cameraman by Any Employer, Party to the Closed-Shop Contracts, at the Time Such Contracts Were Executed.

AUTHORITIES:

Wallace Corp. v. National Labor Relations Board, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216;

Tenth Annual Report, National Labor Relations Board, 57-58;

Twelfth Annual Report, National Labor Relations Board, 49-50.

Finally, appellant contends that the District Court below has jurisdiction under the rule of law enunciated by the Supreme Court of the United States in *Wallace Corp. v. National Labor Relations Board,* 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216.

The *Wallace* case reached the Supreme Court of the United States on writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review judgments enforcing orders of the National Labor Relations Board in an unfair labor practice proceeding. Two competing labor organizations were contending for the right to represent the employees of the Wallace Corporation. Pursuant to an agreement, a consent election was held and the Independent union was certified by the Board as bargaining representative. The company then signed a union shop contract with Independent with the knowledge that Independent intended, by refusing membership to the C. I. O. (defeated union) *employees,* to oust them

from their jobs. Independent thereupon refused to admit C. I. O. men to membership and the company discharged them. We quote from page 224, 89 L. Ed., 223 U. S., page 250, as follows:

> "In a subsequent unfair labor practice proceeding the Board found that (1) Independent had been set up, maintained, and used by the petitioner" (employer) "to frustrate the threatened unionization of its plant by the C. I. O., and (2), the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C. I. O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It entered an order requiring petitioner to disestablish Independent, denominated by it a 'company union'; to cease and desist from giving effect to the union shop contract between it and Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C. I. O., and because of their failure to belong to Independent, as required by the union shop contract."

As appears from the foregoing, the parties aggrieved were, *at the time Independent was elected bargaining representative* of all the *employees,* and for a long time prior thereto had been, *employees* of the company with which the union shop contract was executed, and, what is far more important, that Independent was at the time a company-dominated labor organization; in the instant case, appellant was not an employee (first cameraman) of any of the Hollywood Studios at the time any of the closed-shop contracts referred to in the complaint were executed.

In the *Wallace* case, the labor organization involved (Independent) by operation of law became the bargaining representative of all employees, including those not holding membership, in it, and by reason of the contract which it executed, coupled with its refusal to admit such nonmember employees into membership, deprived them of their existing employment; in the instant case, appellant was not an employee and Defendant Local was never his bargaining representative by operation of law or otherwise. Furthermore, the controlling distinction between the *Wallace* case and the instant action is that in the *Wallace* case the labor organization was company dominated, whereas in the instant action appellant expressly alleges that Defendant Local "is *not* established, maintained or dominated by any employer" [7]. Under the National Labor Relations Act (Wagner Act) and under its successor, the Labor-Management Relations Act, 1947 (Taft-Hartley Act), the right on the part of a labor organization as the bargaining representative of employees to enter into a closed-ship contract is expressly forbidden when the labor organization is "established, maintained or assisted" by the company with which such contract is made (Section 8(3)), National Labor Relations Act and Labor-Management Relations Act, 1947). Where, however, the labor organization is not "company dominated," a closed-shop contract entered into by it is, by both Acts, specifically recognized as valid.

The meaning and effect of the *Wallace* case decision is succinctly set forth in the Tenth Annual Report of the National Labor Relations Board [57-58], from which we quote as follows:

> "*Wallace Corp. v. N. L. R. B.*, 323 U. S. 248, decided December 18, 1944. In this case the Court up-

held the Board's determination that a closed-shop contract made with a *company-dominated union* was invalid and that *discharges* made pursuant to the contract violated Section 8(3) of the Act.

* * * * * * * *

"* * * The Court held that while *the Act sanctions closed-shop contracts,* the employer could not, in cooperation with the union, utilize such a contract to penalize *groups of its employees* because of prior union membership without violating the provisions of the Act which guarantee the right of self-organization and prohibit discrimination on account of the exercise of that right.

* * * * * * * *

"This is the first case under the Wagner Act which presented the Court with an opportunity to define the responsibilities of a collective bargaining agent toward *minority groups in the unit* which under the prevailing principle of majority rule it has exclusive power to represent. The Court laid down these principles: A collective bargaining representative selected by a majority of the *employees* in a unit is the agent of all *employees* and must represent their interests impartially and without discrimination; this duty is violated where the bargaining agent enters into a closed-shop contract with the employer with the declared intention of denying membership to the *former adherents of a rival union* in order to obtain their *discharge* by the employer. The Court's declaration in the *Wallace* case concerning the obligations of a bargaining agent must be compared with its similar holdings in the companion cases of *Steele v. L. & N. R. Co.,* 323 U. S. 192, and *Tunstall v. Brotherhood,* 323 U. S. 210. These cases, decided contemporaneously with the Wallace case, involved dis-

> crimination by railway labor organizations against *employees* of the Negro race. The three cases, the Court subsequently stated (*Hunt v. Grumbach,* 65 S. Ct. 1545), 'stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it *purports to represent.*'"

In the Twelfth Annual Report of the National Labor Relations Board, pages 49-50, we find these further references to the *Wallace* case as follows: "The principle announced by the Supreme Court in *Wallace Corp. v. N. L. R. B.* * * * that a closed-shop proviso does not sanction the *discharge* of *employees* whom the contracting union has expelled for the purpose of penalizing them for their activities on behalf of a rival union, etc.," and "the *Wallace* case was concerned with a closed-shop contract made and utilized by the contracting union for the purpose of eliminating from its membership *employees* who had previously opposed it."

On pages 7 and 8 of his opening brief, appellant, apparently for the purpose of endeavoring to persuade this Court that the District Court below has jurisdiction of this action either under The Tunstall Case Doctrine or the doctrine of the *Wallace* case—or a blend of both doctrines concocted by appellant—quotes from the dissenting opinion of Mr. Justice Jackson in *Trailmobile Co. v. Whirls,* 331 U. S. 40, 67-68, 67 S. Ct. 982, 995-996, 92 L. Ed. 1328, 1345. We concede that even a dissenting opinion of such a distinguished jurist as Mr. Justice Jackson is entitled to great respect, but it, nevertheless, remains a dissenting opinion. There are, however, two phrases in the quotation set forth by appellant which we believe should be emphasized, namely, "*those who undertake to act for*

others," and *"assumed to represent,"* appearing in the sentence reading as follows: "Courts from time immemorial have held that *those who undertake to act for others* are held to good faith and fair dealing and may not favor themselves at the cost of those they have *assumed to represent.*" We reiterate, in order to emphasize, that Defendant Local did not at any time "undertake to act" for appellant and has not at any time "assumed to represent" him.

If a basis exists for charges by appellant against the Hollywood Studios of unfair labor practices, under the doctrine of the *Wallace* case, despite the fact that Defendant Local is not a "company-dominated labor organization," that matter would be within the exclusive jurisdiction of the National Labor Relations Board; if appellant is of the opinion that the factual matters alleged in his complaint constitute unfair labor practices on the part of Defendant Local under the Labor-Management Relations Act, 1947, it is the National Labor Relations Board, and not District Courts of the United States, which likewise possesses exclusive jurisdiction thereof. (*Amazon Mills Co. v. Textile Workers Union* (C. C. A. 4th, 1948), 167 F. 2d 183; *Donnelly Garment Co. v. International Ladies' Garment Workers Union,* 99 F. 2d 309; *Gerry of California v. Superior Court,* 32 A. C. 141, 194 P. 2d 689.)

From "prior to 1941," [6]—while appellant was still a resident of Poland and before he had even entered the United States [9]—and continuously down to the present time, closed-shop contracts covering first cameramen in the California motion picture studios have been and now are in effect, originally "from prior to 1941 to until the

end of 1942" [6] with ASC, from "on or about January 1, 1943, to and including the date of the filing of this complaint" [8] with Defendant Local, and the last closed-shop contract "was executed in writing as of January 1, 1946, for a term ending December 31, 1948," with Defendant Local [8].

The condition of which appellant complains existed on and before his arrival in this country; it is thus he found it and it has not since changed.

Conclusion.

Appellees Defendant Local and Aller respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

Bodkin, Breslin & Luddy,
Henry G. Bodkin,
George M. Breslin,
Michael G. Luddy,
Attorneys for Appellees Defendant Local and Aller.

APPENDIX A.

Love v. Chandler, 124 F. 2d 785 at 786-787:

"The appellant contends that his complaint states a claim under Sec. 47(2) and (3) of Title 8, U. S. C. A., authorizing actions for damages for conspiracies to deprive citizens of the equal protection of the laws or from exercising any right or privilege as a citizen of the United States, and that it also states a claim under Sec. 48 of Ttile 8, U. S. C. A., which authorizes the recovery of damages from any person who, having knowledge of such a conspiracy and the power to prevent it, neglects or refuses so to do. The appellant further contends that the trial court had jurisdiction of the subject matter of this action by virtue of Sec. 41(12), (13) and (14) of Title 28, U. S. C. A., which confer upon the District Courts of the United States jurisdiction of actions to recover damages for deprivation of rights in furtherance of such conspiracies as are described in Sec. 47 of Title 8, U. S. C. A.

"The trial court was of the opinion that, since this Court had held in *Love v. United States,* 108 F. (2d) 43, 49, that the right of the appellant to be employed by the Works Progress Administration was not an absolute right conferred by the Constitution or laws of the United States and that the District Court was without jurisdiction to review the administrative action of which the appellant had complained in that case, the complaint in the instant action, under the

rule announced in *Mitchell v. Greenough,* 9 Cir., 100 F. (2d) 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056, did not state a claim for damages resulting from a conspiracy to deprive the appellant of any right or privilege dependent upon a law of the United States.

"The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. (Citing cases.) The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. (Citing cases.) The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (*United States v. Mosley,* 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355), *did not have the effect of taking into federal control the protection of private rights against invasion by individuals.* (Citing cases.) The protection of such rights and redress for such wrongs was left with the States. (Citing cases.)

"The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that *he had no absolute* right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, *and interference with his efforts to obtain and retain employment with the Works Progress Administration.* The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State. (Citing cases.) We agree with the trial court that the appellant has failed to state a claim upon which relief could be granted under the statutes which he has invoked. His complaint was properly dismissed."

APPENDIX B.

Steele v. Louisville, etc., 323 U. S. 192 at 194, 89 L. Ed. 173 at 179:

"The allegations of the bill of complaint, so far as now material, are as follows: Petitioner, a Negro, is a locomotive fireman *in the employ of respondent railroad,* suing on his own behalf and *that of his fellow employees* who, like petitioner, are Negro firemen employed by the Railroad. Respondent Brotherhood, a labor organization, is, as provided under Sec. 2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the *craft of firemen employed* by the Railroad and is recognized as such by it and the members of the craft. The majority of the firemen *employed* by the Railroad are white and are members of the Brotherhood, but a substantial minority are Negroes who, by the constitution and ritual of the Brotherhood, are excluded from its membership. As the membership of the Brotherhood constitutes a majority of all firemen *employed* on respondent Railroad, and as under Sec. 2, Fourth the members because they are the majority have the right to choose and have chosen the Brotherhood to represent the craft, petitioner and other Negro firemen on the road have been required to accept the Brotherhood as their representative for the purposes of the Act.

"On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of fire-

men, without informing the Negro firemen or giving them opportunity to be heard, served a notice on respondent Railroad and on twenty other railroads operating principally in the southeastern part of the United States. The notice announced the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service. By established practice on the several railroads so notified only white firemen can be promoted to serve as engineers, and the notice proposed that only 'promotable,' *i. e.,* white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

* * * * * * * *

". . . On May 12, 1941, the Brotherhood entered into a supplemental agreement with respondent Railroad further controlling the seniority rights of Negro firemen and restricting their *employment.* The Negro firemen were not given notice or opportunity to be heard with respect to either of these agreements, which were put into effect before their existence was disclosed to the Negro firemen.

* * * * * * * *

". . . The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the

Act to represent the Negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and disloyal to the Negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of *employment in their craft,* all in order to create a monopoly of employment for Brotherhood members.

* * * * * * * *

"The labor organization chosen to be the representative of the craft or class of *employees* is thus chosen to represent all of its members, regardless of their union affiliations or want of them."